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Siti Nur Aishah bt Ishak v Golden Plus Holdings Bhd

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(IM)(NCC)-1898–10 OF 2016
ROHANA YUSUF, IDRUS HARUN AND MARY LIM JJCA
4 APRIL 2017

C *Civil Procedure — Jurisdiction — Civil jurisdiction of High Court — Whether High Court in Malaya and High Court in Sabah and Sarawak would both have jurisdiction to hear same matter if any one of conditions in s 23(1)(a), (b), (c) or (d) of the Courts of Judicature Act 1964 ('the CJA') fell within their respective local/territorial jurisdiction — Whether High Court first seised with jurisdiction*
D *would not become incompetent just because some other condition in s 23(1) conferred jurisdiction on the other High Court — Whether no legislation or enabling power existed to allow High Court in Malaya or High Court in Sabah and Sarawak to transfer matters as between themselves — Whether any such purported transfer would violate art 121(1) of the Federal Constitution and s 23(1) of the*
E *CJA in view of Federal Court's decision in Hap Seng Plantations (River Estates) Sdn Bhd v Excess Interpoint Sdn Bhd & Anor*

The appellant, a shareholder of the respondent public company, filed a petition on 15 August 2016 at the High Court in Kuala Lumpur to wind up the
F respondent under s 218(1)(b), (f) and/or (i) of the Companies Act 1965 ('the CA'). The respondent applied to strike out the petition pursuant to s 23(1) of the Courts of Judicature Act 1964 and/or O 18 r 19(1)(a), (b), (c) and/or (d) of the Rules of Court 2012 and/or the inherent jurisdiction of the court on the sole ground that as the respondent's registered office was at Kota Kinabalu in
G Sabah, only the High Court in Sabah and Sarawak had jurisdiction to hear the petition. The respondent also said the High Court in Sabah and Sarawak was the appropriate forum to hear the petition because all the records of the respondent were in Sabah and all its directors lived there. In the year 2011, the respondent moved its business address from Kuala Lumpur to Selangor and,
H two years after that, to Sabah. In support of its striking-out application, the respondent pointed out that the appellant's solicitors had themselves served the winding up petition by sending it by way of courier on 30 August 2016 to its Sabah address. The appellant appealed against the High Court's decision.

I **Held,** allowing the appeal and setting aside the decision of the High Court:

(1) Once any of the conditions in s 23(1)(a), (b), (c) or (d) of the Courts of Judicature Act 1964 ('the CJA') were met, the High Court in Malaysia

took jurisdiction. In considering whether the High Court in Malaya or the High Court in Sabah and Sarawak had jurisdiction, the same conditions in s 23(1) had to be met but this time examined from the perspective of the 'local jurisdiction' or territorial jurisdiction of the High Court. Once any of the conditions was fulfilled and the particular High Court assumed or was seised with local jurisdiction, that jurisdiction was not lost, defeated or divested. The High Court that was first seised with jurisdiction did not become incompetent just because some other condition in s 23(1) conferring jurisdiction on the other High Court was met. What was necessary was that the High Court before which the civil proceedings was filed had the requisite jurisdiction to try the proceedings (see paras 32–33).

(2) An examination of the winding up petition in the instant case showed that the conditions in s 23(1)(a) and (c) were met. It was apparent from the petition that the alleged facts, assumed to be true for the present purposes, existed or had all occurred within the local or territorial jurisdiction of the High Court in Malaya. Those facts were sufficient to sustain a claim that the cause of action arose in the territorial jurisdiction of the High Court in Malaya. The High Court in Malaya was seised with the necessary territorial jurisdiction even if one of the other circumstances, for example, the residence of the defendant, was in the High Court in Sabah and Sarawak. That was a matter of forum conveniens with regard to which, for the present, there was still no legislation or enabling power to effect a transfer from one High Court to the other High Court without violating art 121(1) of the Federal Constitution and s 23(1) of the CJA; and this was made abundantly clear by the Federal Court in *Hap Seng Plantations (River Estates) Sdn Bhd v Excess Interpoint Sdn Bhd & Anor* [2016] 3 MLJ 553 (see paras 44, 46 & 56).

(3) The fact that the petition was served at the Kota Kinabalu address did not, in any way, mean the High Court of Malaya was divested of jurisdiction conferred under s 23(1)(a), (b) and (c) of the CJA. The service merely complied with the provisions on how service of an originating process was to be effected. Those service provisions did not confer jurisdiction, certainly not for the purpose of Malaysians resident within both territories of the High Courts in Malaysia (see para 65).

(4) The High Court in the present case erred in allowing the respondent's application to strike out the petition on the ground the respondent was resident in Kota Kinabalu. Neither s 218 nor any other provision in the Companies Act 1965 or even s 23(1) of the CJA put the requirement of residence or place of business of the respondent at the top of the list of

circumstances. The circumstances in s 23(1) did not possess any order of priority or importance; so long as one of the conditions was fulfilled, the relevant High Court was seised of territorial jurisdiction (see para 58).

(5) The High Court erred in finding that the respondent's place of business was in Kota Kinabalu at the material time of filing of the petition. The respondent's claim that it had no business interests or any connection with West Malaysia was hard to fathom given that it was incorporated in Malaysia with shareholders such as the appellant who resided in West Malaysia. Surely, the shareholders of the respondent formed part of the respondent's business interests (see para 59).

(6) The appellant was entitled to rely on statutory and official records to determine the respondent's place of business or business address. She relied on her official search of the respondent obtained from the Companies Commission of Malaysia which revealed that as at 11 May 2016, before the petition was filed, the respondent's business address was in Kuala Lumpur. Aside from that, the appellant relied on the respondent's annual return filed in 2010 and this was the only return available to the public, including the respondent's shareholders such as the appellant. That annual return, mandatorily required under s 165 of the Companies Act 1965, recorded the respondent as still holding out from the same business address. There were no announcements regarding a change in the respondent's business address. The announcements were only in respect of the change of registered address. The appellant had also alluded to projects that the respondent was involved in — all of them were located in West Malaysia. The other winding up petitions against the respondent were also filed in West Malaysia (see paras 60 & 62–63).

[Bahasa Malaysia summary

Perayu, seorang pemegang saham syarikat awam, memfailkan petisyen pada 15 Ogos 2016 di Mahkamah Tinggi Kuala Lumpur untuk menggulungkan responden di bawah s 218(1)(b), (f) dan/atau (i) Akta Syarikat 1965. Responden memohon untuk membatalkan petisyen menurut s 23(1) Akta Mahkamah Kehakiman 1964 dan/atau A 18 k 19(1)(a), (b), (c) dan/atau (d) Kaedah-Kaedah Mahkamah 2012 dan/atau bidang kuasa inheren mahkamah atas alasan tunggal bahawa pejabat berdaftar responden berada di Kota Kinabalu, Sabah, hanya Mahkamah Tinggi Sabah dan Sarawak mempunyai bidang kuasa untuk mendengar petisyen. Responden juga menyatakan Mahkamah Tinggi Sabah dan Sarawak adalah forum yang sewajarnya untuk mendengar petisyen kerana semua rekod responden berada di Sabah dan semua pengarah menetap di sana. Dalam tahun 2011, responden memindahkan alamat perniagaannya dari Kuala Lumpur ke Selangor, dan dua tahun selepas itu, ke Sabah. Untuk menyokong permohonan pembatalan itu, responden menegaskan bahawa peguamcara perayu sendiri telah menyerahkan

petisyen penggulungan dengan menghantarnya melalui kurier pada 30 Ogos 2016 ke alamatnya di Sabah. Perayu merayu terhadap keputusan Mahkamah Tinggi.

Diputuskan, membenarkan rayuan dan mengetepikan keputusan Mahkamah Tinggi:

(1) Apabila apa-apa syarat dalam s 23(1)(a), (b), (c) atau (d) Akta Mahkamah Kehakiman 1964 ('AMK') dipenuhi, Mahkamah Tinggi di Malaysia mengambil bidang kuasa. Dalam mempertimbangkan sama ada Mahkamah Tinggi Malaya atau Mahkamah Tinggi Sabah dan Sarawak mempunyai bidang kuasa, syarat yang sama dalam s 23(1) hendaklah dipenuhi tetapi kali ini dilihat daripada perspektif 'local jurisdiction' atau bidang kuasa wilayah Mahkamah Tinggi. Apabila apa-apa syarat telah dipenuhi dan Mahkamah Tinggi tertentu telah dianggap atau memiliki bidang kuasa tempatan, bidang kuasa tersebut tidak hilang, dikalahkan atau dilucut hak. Mahkamah Tinggi pertama yang memiliki bidang kuasa tidak menjadi tidak kompeten hanya kerana syarat lain dalam s 23(1) yang memberikan bidang kuasa kepada Mahkamah Tinggi lain telah dipenuhi. Apa yang penting adalah Mahkamah Tinggi yang mana di hadapannya prosiding sivil telah difailkan mempunyai bidang kuasa yang diperlukan untuk membicarakan prosiding (lihat perenggan 32–33).

(2) Satu pemeriksaan petisyen penggulungan dalam kes ini menunjukkan bahawa syarat dalam s 23(1)(a) dan (c) telah dipenuhi. Ia adalah jelas daripada petisyen bahawa fakta yang dikatakan, yang dianggap benar untuk tujuan sekarang, wujud atau telah berlaku di dalam bidang kuasa tempatan atau wilayah Mahkamah Tinggi Malaya. Fakta itu adalah mencukupi untuk mengekalkan tuntutan bahawa kausa tindakan timbul dalam bidang kuasa wilayah Mahkamah Tinggi Malaya. Mahkamah Tinggi Malaya telah memiliki bidang kuasa wilayah yang perlu jika pun satu daripada keadaan, contohnya, kediaman defendan, adalah di Mahkamah Tinggi Sabah dan Sarawak. Itu adalah suatu perkara forum conveniens dengan mengambil kira, untuk masa kini, masih belum terdapat undang-undang atau kuasa untuk melaksanakan pindahan daripada satu Mahkamah Tinggi ke Mahkamah Tinggi lain tanpa melanggar perkara 121(1) Pelembagaan Persekutuan dan s 23(1) AMK; dan ini dibuat dengan jelas oleh Mahkamah Persekutuan dalam kes *Hap Seng Plantations (River Estates) Sdn Bhd v Excess Interpoint Sdn Bhd & Anor* [2016] 3 MLJ 553 (lihat perenggan 44, 46 & 56).

(3) Fakta bahawa petisyen diserahkan di alamat Kota Kinabalu tidak, dalam apa cara sekalipun, bermakna Mahkamah Tinggi Malaya telah dilucut hak terhadap bidang kuasa yang diberikan di bawah s 23(1)(a), (b) dan

(c) AMK. Penyerahan itu hanya mematuhi peruntukan mengenai bagaimana penyerahan proses pemula akan dilaksanakan. Penyerahan peruntukan tidak memberikan bidang kuasa, sudah tentu bukan bagi tujuan penduduk Malaysia dalam kedua-dua wilayah Mahkamah Tinggi di Malaysia (lihat perenggan 65).

(4) Mahkamah Tinggi dalam kes ini terkhilaf dalam membenarkan permohonan responden untuk membatalkan petisyen atas alasan responden menetap di Kota Kinabalu. Bukan s 218 mahupun apa-apa peruntukan lain dalam Akta Syarikat 1965 ataupun s 23(1) AMK meletakkan kehendak kediaman atau tempat perniagaan responden di atas senarai keadaan itu. Keadaan dalam s 23(1) tidak mempunyai apa-apa susunan keutamaan atau kepentingan; asalkan salah satu syaratnya dipenuhi, Mahkamah Tinggi yang relevan memiliki bidang kuasa wilayah (lihat perenggan 58).

(5) Mahkamah Tinggi terkhilaf dalam mendapati tempat perniagaan responden adalah di Kota Kinabalu pada waktu material pemfailan petisyen. Dakwaan responden bahawa ia tidak mempunyai kepentingan perniagaan atau apa-apa hubungan dengan Malaysia Barat adalah amat sukar untuk difahami memandangkan ia ditubuhkan di Malaysia dengan pemengang saham seperti perayu yang menetap di Malaysia Barat. Tentunya, pemegang saham responden menjadi sebahagian daripada kepentingan perniagaan responden (lihat perenggan 59).

(6) Perayu berhak untuk bergantung kepada laporan statutori dan rasmi untuk menentukan tempat perniagaan atau alamat perniagaan responden. Dia bergantung kepada carian rasminya terhadap responden yang diperolehi daripada Suruhanjaya Syarikat Malaysia yang menunjukkan bahawa pada 11 Mei 2016, sebelum petisyen difailkan, alamat perniagaan responden adalah di Kuala Lumpur. Selain itu, perayu bergantung kepada pulangan tahunan responden yang difailkan pada tahun 2010 dan ini sahaja pulangan yang boleh didapati oleh pihak umum, termasuk pemegang saham responden seperti perayu. Pulangan tahunan itu, mewajibkan di bawah s 165 Akta Syarikat 1965, merekodkan bahawa responden masih menggunakan alamat perniagaan yang sama. Tidak terdapat pengumuman berkaitan pertukaran alamat perniagaan responden. Pengumuman hanya berkaitan pertukaran alamat berdaftar. Perayu juga telah merujuk kepada projek-projek yang terlibat oleh responden — kesemuanya bertempat di Malaysia Barat. Petisyen penggulungan lain terhadap responden juga difailkan di Malaysia Barat (lihat perenggan 60 & 62–63).]

Notes

For cases on civil jurisdiction of High Court, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 6024–6025.

Cases referred to

Bank Industri & Teknologi Malaysia Bhd v Alom Building Systems Sdn Bhd [2006] 4 MLJ 405, HC (refd)
Bank Utama (M) Bhd v Perkapalan Dai Zhun Sdn Bhd [2003] 5 MLJ 40, HC (refd)
Dayasar Corp Sdn Bhd v CP Ng & Co Sdn Bhd [1990] 1 MLJ 191, HC (distd)
Distillers Co (Bio-Chemicals) Ltd v Thompson (by her next friend Arthur Leslie Thompson) [1971] 1 All ER 694, PC (refd)
Fung Beng Tiat v Marid Construction Co [1996] 2 MLJ 413; [1997] 2 CLJ 1, FC (distd)
Goodness For Import And Export v Phillip Morris Brands Sarl [2016] 5 MLJ 171, FC (folld)
Hap Seng Plantations (River Estates) Sdn Bhd v Excess Interpoint Sdn Bhd & Anor [2016] 3 MLJ 553, FC (refd)
Malayan Banking Berhad v International Tin Council and another appeal [1989] 3 MLJ 286, SC (refd)
Malaysian Assurance Alliance Bhd v Comsa Properties Sdn Bhd [2013] 1 CLJ 69, CA (distd)
Matchplan (M) Sdn Bhd & Anor v William D Sinrich & Anor [2004] 2 MLJ 424, CA (refd)
Petrodar Operating Co Ltd v Nam Fatt Corp Bhd (in liquidation) & Anor [2014] 6 MLJ 189, FC (refd)
Summit Company (M) Sdn Bhd v Nikko Products (M) Sdn Bhd [1985] 1 MLJ 68; [1985] CLJ Rep 304, FC (distd)
Syarikat Nip Kui Cheong Timber Contractor v Safety Life And General Insurance Co Sdn Bhd [1975] 2 MLJ 115 (refd)

Legislation referred to

Bankruptcy Act 1967 ss 5(1)(d), 93(7), 131
Bankruptcy Rules 1969 r 101, 101(1), (2)
Companies Act 1965 ss 4, 120, 165, 218, 218(1)(a), (1)(b), (1)(c), (1)(d), (1)(e), (1)(f), (1)(g), (1)(h) (1)(i), (1)(j), (1)(k), (1)(l), (1)(m), (1)(n)
Companies Regulations 1966 Form 44
Companies Commission of Malaysia Act 2001 s 17(e), First Schedule
Courts of Judicature Act 1964 ss 3, 21(1), 23, 23(1), 23(1)(a), (1)(b), (1)(c), (1)(d), 25, 25(1), (2), 84
Customs Act 1967 s 133(1)(a)
Federal Constitution arts 121, 121(1), 128, 160(2)
Rules of Court 2012 O 11, O 11 r 1, O 12 r 10(1), 10(2), (4), (5), O 18 r 19(1)(a), (1)(b), (1)(c), (1)(d), O 57, O 57 r 1
Rules of the High Court 1980 O 11, O 11 r 1, O 62 r 4(1)

Appeal from: Companies (Winding-Up) No WA-28NCC-692–08 of 2016 (High Court, Kuala Lumpur)

Gopal Sreenevasan (S Ravindran with him) (Sreenevasan Young) for the appellant.
Loh Siew Chiang (Lim Tuck Sum, Dennis Yuean and Aerie Rahman with him) (Chooi & Co) for the respondent.

Mary Lim JCA (delivering judgment of the court):

[1] At the High Court, the respondent's application to strike out the above winding up petition made pursuant to s 23(1) of the Courts of Judicature Act 1964 ('Act 91') and/or O 18 r 19(1)(a), (b), (c) and/or (d) of the Rules of Court 2012 and/or inherent jurisdiction of the court, was allowed with no order as to costs. The appellant/petitioner appealed. Upon hearing learned counsel for the respective parties, we allowed the appeal with costs of RM10,000 subject to payment of allocatur.

[2] The appeal turns on the narrow issue of the jurisdiction of the High Court of Malaya to hear the present winding up petition; it being contended by the respondent that the petition fell outside the jurisdiction of the High Court of Malaya as conferred by s 23 of Act 91. These are some relevant background facts which will assist in appreciating the arguments.

[3] The respondent is a public company incorporated under the Companies Act 1965 since 16 January 1984. It was previously known as Dayapi Industries (M) Bhd and it was listed on the main board of Bursa Malaysia on 29 November 1984. It underwent a name change to its present name on 25 January 1990. The respondent is in the business of investment and property holding. Its registered office is at Suite 7–8, 12th Floor, Wisma Perindustrian, Jalan Istiadat, Likas, 80000, Kota Kinabalu, Sabah whilst its business address is at Suite 6–7 and Suite 6–8, Wisma UOA Damansara, No 6 Jalan Changkat Semantan, Damansara Heights, 50490, Kuala Lumpur.

[4] On 15 August 2016, the appellant, a registered shareholder of the respondent filed a petition in the High Court of Malaya to wind up the respondent under s 218(1)(b), (f) and/or (i) of the Companies Act 1965. In her petition, the appellant relied on the following grounds in support of her application to wind up the respondent.

[5] First, the appellant referred to the fact that the respondent had already been subjected to two earlier winding up petitions, one by Lee Swee Hock on 9 January 2008 before the High Court at Kuala Lumpur, the other by Krish Maniam & Co on 31 July 2013 before the High Court at Shah Alam. Both petitions were resolved through separate consent orders.

[6] Second, the appellant referred to the existence of a boardroom tussle as early as 2007 between the respondent's single largest shareholder, Indian

Corridor Sdn Bhd, Pembangunan Qualicare Sdn Bhd, yet another shareholder and the board of directors of the respondent. The earlier two parties sought to requisition an EGM of the respondent with a view to replacing the existing board with a group of new directors. Between 27 December 2007 and 28 October 2008, the parties were embroiled in litigation that went all the way to the Federal Court but with various resignations of some of the directors, the litigation was also resolved.

[7] Third, that the respondent was further involved in what was described as 'management agreement litigation' related to its property development project in Shanghai known as the 'Royal Garden Townhouses and Condominiums Project'. This litigation, too, culminated in a consent order before the High Court in Shah Alam but proceedings are underfoot against the respondent's CEO in respect of that consent order.

[8] Fourth, the various actions taken by Bursa against the respondent. Amongst them was a suspension of trading of its securities due to failure to submit its annual audited accounts for the financial year ended 31 December 2008; enforcement action by Bursa against the directors for various breaches of the listing requirements; delisting of the respondent's securities from the official list of Bursa Securities on 19 April 2016.

[9] For all these reasons and with all these events as well as the lack of the latest financial statements and annual reports (none allegedly issued for the FYE 31 December 2010–2014), the appellant claimed that the board has lost control of the management and operations of the respondent. The appellant avers:

> Given the present scenario, there is no realistic option or route by which the shareholders can realise the value of their investment save for the winding up of the Company and the consequent distribution of its assets.

[10] By encl 10, the respondent applied to strike out the petition on the ground that it is scandalous, frivolous, vexatious and/or an abuse of the process of the court in that:

(a) the High Court of Malaya does not have jurisdiction to adjudicate the petition;

(b) the High Court of Sabah and Sarawak in Kota Kinabalu is the appropriate forum to determine this matter; and

(c) the appellant is aware that the respondent is no longer situate in Kuala Lumpur.

[11] In the affidavit filed in support of the application, Tan Say Han, a

director of the respondent deposed that:

(a) the respondent was served with the petition by way of courier on 30 August 2016 under a cover letter from the appellant's solicitors addressed to its Sabah address;

(b) the respondent had moved away from its address at Suite 6–7 and Suite 6–8, Wisma UOA Damansara, No 6 Jalan Changkat Semantan, Damansara Heights, 50490, Kuala Lumpur on or around 31 March 2011 upon termination of its tenancy ('KL address');

(c) the respondent had then moved into its office at Unit A-13A-06 and A13A-08, 13A Floor, Block A, Damansara Intan, No 1 Jalan SS 20/27, 47400, Petaling Jaya, Selangor Darul Ehsan ('Selangor address');

(d) this change of address was announced on Bursa and a Notice of Situation of Registered Office and of Office Hours and Particulars of Change (Form 44) under the Companies Act 1965 was duly lodged;

(e) on or around October 2013, the respondent moved to its Sabah address after its tenancy in the Selangor address was terminated;

(f) this change was also announced on Bursa and the appropriate Form 44 was lodged;

(g) all the directors reside in Sabah;

(h) all the documents and records of the respondent are kept in Sabah; and

(i) had the appellant served the petition at the KL address, he would have known that the respondent was no longer at that address.

[12] For all these reasons, the respondent contended that:

(a) the High Court in Malaya does not have jurisdiction to hear the petition because the respondent's registered office is in Kota Kinabalu, Sabah; and that it is the High Court of Sabah and Sarawak that has the jurisdiction to hear any action to wind up the respondent;

(b) the appropriate forum for the petition is the High Court of Sabah and Sarawak because the respondent's documents and records are kept in Sabah, and all its three directors reside in Sabah; and

(c) in the event that the action is adjudicated by the High Court of Sabah and Sarawak, the appellant will not suffer any prejudice or injustice as the High Court has all the requisite powers to determine the matter.

[13] In essence, the respondent maintained in their cause papers, and in their submissions before the High Court as well as in the submissions before us, that the High Court in Malaya has no jurisdiction to hear this petition because

the respondent's registered address is at Kota Kinabalu, Sabah. Consequently, the only court before which the present petition may be filed is the High Court in Sabah and Sarawak because that is where the respondent's registered address is. That is the respondent's sole ground and it turns on the respondent's interpretation of s 23 of Act 91.

[14] The learned High Court judge agreed with the contentions of the respondent and struck out the petition with no order as to costs. In coming to her decision, the learned judge examined the location of the registered address of the respondent, tracking and observing its several changes from the time it was incorporated to where it is presently located before concluding that the respondent's registered address is now indeed in Kota Kinabalu, Sabah. The learned judge also observed that the appellant had served the petition at the present address by courier service and it was Her Ladyship's view that since the respondent had categorically averred that it does not conduct its business within the jurisdiction of the High Court of Malaya or in the Peninsula Malaysia; that in all its changes of address, the respondent had complied with the requirements of s 120 of the Companies Act 1965 by completing and lodging Form 44; that the respondent resides in Kota Kinabalu, the petition 'ought to be filed in the High Court of Sabah and Sarawak at Kota Kinabalu pursuant to s 23(1)(b) of the CJA'. In coming to her decision, the learned judge relied on the two decisions of the Court of Appeal in *Fung Beng Tiat v Marid Construction Co* [1996] 2 MLJ 413 and *Malaysian Assurance Alliance Bhd v Comsa Properties Sdn Bhd* [2013] 1 CLJ 69 which had agreed with earlier decisions of the High Court in *Dayasar Corp Sdn Bhd v CP Ng & Co Sdn Bhd* [1990] 1 MLJ 191 and *Syarikat Nip Kui Cheong Timber Contractor v Safety Life And General Insurance Co Sdn Bhd* [1975] 2 MLJ 115.

[15] With respect, we must disagree.

[16] A careful reading of those decisions will readily show that the courts have consistently interpreted the meaning and operation of s 23(1) of Act 91 in line with art 121(1) of the Federal Constitution. When art 121(1) established two High Courts of coordinate jurisdiction in the country, it also provided for federal law to be enacted to confer the necessary jurisdiction and power. This is what art 121(1) states:

> 121(1) There shall be two High Courts of co-ordinate jurisdiction and status, namely —
>
> (a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry at such place in the States of Malaya as the Yang di-Pertuan Agong may determine; and

A (b) one in the States of Sabah and Sarawak, which shall be known as the High Court of Sabah and Sarawak and shall have its principal registry at such place in the States of Malaya as the Yang di-Pertuan Agong may determine;

B and such inferior courts as may be provided by federal law; and the High Courts and inferior courts shall have jurisdiction and powers as may be conferred by or under federal law.

[17] Act 91 is federal law enacted to confer the necessary civil and criminal jurisdiction and power on both High Courts. In respect of civil jurisdiction, C s 23(1) of Act 91 confers on the two High Courts jurisdiction to try all civil proceedings within its respective local jurisdictions:

(1) Subject to the limitations contained in Article 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where —

D (a) the cause of action arose;

(b) the defendant or one of several defendants resides or has his place of business;

(c) the facts on which the proceedings are based exist or are alleged to E have occurred; or

(d) any land the ownership of which is disputed is situated,
within the local jurisdiction of the Court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High F Court.

[18] The terms 'High Court' and 'local jurisdiction' are defined in s 3 of Act 91 as follows:

G 'High Court' means the High Court in Malaya and the High Court in Sabah and Sarawak or either of them, as the case may require;

'local jurisdiction' means —

(a) in the case of the High Court in Malaya, the territory comprised in the States of Malaya, namely, Johore, Kedah, Kelantan, Malacca, Negeri H Sembilan, Pahang, Penang, Perak, Selangor, Terengganu and the Federal Territory of Kuala Lumpur; and

(b) in the case of Sabah and Sarawak, the territory comprised in the States of Sabah, Sarawak and the Federal Territory of Labuan,

I including in either case, the territorial waters and the air space above those States and the territorial waters;

[19] The meaning of 'local jurisdiction' in s 3 of Act 91 was dealt with in *Syarikat Nip Kui Cheong Timber Contractor v Safety Life And General Insurance*

Co Sdn Bhd. Hashim Yeop A Sani J (later Chief Justice, Malaya) examined that definition by reference to art 121(1) and held that it referred to the respective 'territorial jurisdiction' of the High Court in Malaya and the High Court in Borneo (now Sabah and Sarawak):

> It is all too clear that both the High Court in Malaya and the High Court in Borneo have separate and distinctive territorial jurisdictions. Article 121(1) of the Constitution speaks of the two High Courts having 'co-ordinate jurisdiction' and the definition of 'local jurisdiction' in the Courts of Judicature Act 1964 speaks of the territorial jurisdiction of each of the two High Courts ...

[20] The term 'civil proceedings' in s 21(1) is however, not defined in Act 91, but the term 'proceeding' is, and it is defined in s 3 to mean 'any proceeding whatsoever of a civil or criminal nature and includes an application at any stage of a proceeding'. Without a doubt, this definition is extensive enough to include the present winding up petition filed under the Companies Act 1965.

[21] From a plain reading of s 23(1)(a)–(d), the civil proceedings which may be tried in both the High Courts is the same; hence the meaning and effect when art 121(1) of the Constitution refers to the two High Courts as having 'co-ordinate jurisdiction'. However, that jurisdiction of each High Court is not exercised over the same territory. That jurisdiction is instead, exercised over different geographical territories as defined in s 3 of Act 91. In this regard, Abu Mansor J (as he then was) in *Dayasar Corp Sdn Bhd v CP Ng & Co Sdn Bhd* [1990] 1 MLJ 191 at p 192 said:

> While matters can be heard in any court of the courts in Malaya, I am of the view it was certainly not the intention of the legislature for any court in Malaya to assume jurisdiction of a matter arising in or which should be filed in a Borneo court. With respect I agree and adopt what is stated by Hashim J (as he then was) in *Syarikat Nip Kui Cheong Timber Contractor v Safety Life and General Insurance Co Sdn Bhd* that the definition of local jurisdiction sets out and determines the territorial jurisdiction of either of the High Courts.

[22] This dicta was approved by the Federal Court as the 'correct approach to the question of jurisdiction' in *Fung Beng Tiat v Marid Construction Co* [1996] 2 MLJ 413; [1997] 2 CLJ 1.

[23] The determination of which of the two High Courts has in fact the territorial jurisdiction to try a particular set of civil proceedings in turn depends on the application and operation of s 23 of Act 91 and any other specific law or 'federal law' as envisaged under art 121(1) to the particular facts and nature of those civil proceedings. Insofar as s 23(1) is concerned, save for the limitations under art 128, the High Court is seised with jurisdiction to try civil proceedings where any of the four prescribed conditions either arose or occurred within its territory. The particular High Court will assume

jurisdiction where either the cause of action arose within its local or territorial jurisdiction; or where the defendant resides or has his place of business within its local or territorial jurisdiction; or where the facts on which the proceedings are based or alleged to have occurred are either based or have occurred within its local or territorial jurisdiction; or where the civil proceedings involve a dispute as to ownership of any land and that land is situated within its local or territorial jurisdiction.

[24] These four conditions are read disjunctively and that means that so long as any one of the four conditions is met, then that High Court has jurisdiction or is competent to try the civil proceedings.

[25] Support for this view can be found from several decisions of the Federal Court and Court of Appeal. In the recent decision of the Federal Court in *Goodness For Import And Export v Phillip Morris Brands Sarl* [2016] 5 MLJ 171 which is a case not entirely on s 23(1) but that provision read with O 11 r 1 of the Rules of Court 2012, the comprehensive decision of the Federal Court on s 23(1) is nevertheless relevant and insightful for our present appeal. In that decision, the Federal Court also took the occasion to examine several earlier decisions on the application of s 23(1).

[26] In *Goodness For Import And Export*, the plaintiff, the registered proprietor and/or common law owner and/or beneficial owner in Malaysia of MARLBORO and MARLBORO Roof Lines trademarks for tobacco, raw and manufactured; and other tobacco products, sued five defendants for infringement of its trademark and for passing off after the Royal Malaysia Customs and Excise ('RMC') had detained and seized ten containers in which were found cigarettes instead of the declared Omani Marble. The second to the fifth defendants were companies incorporated in Malaysia with registered addresses in West Malaysia. The first defendant, the consignor and/or owner of the cigarettes or ten containers however, was a foreign entity (a business whose last known address was in Cairo, Egypt). After investigations, RMC offered a compound for the offence of making false declarations under s 133(1)(a) of the Customs Act 1967. The compound was paid by the first and second defendants. The first defendant then sought the release of the cigarettes/containers.

[27] The plaintiff obtained an ex parte injunction preventing, inter alia, the release of the containers to the first defendant. Although the first defendant had yet to be served with the writ, it instructed solicitors who attended court on the return date for the inter partes hearing of the application for injunction. The court records showed that the first defendant's counsel advised the court that she had received instructions to accept service of the papers that had yet to be served. The first defendant's counsel attended court twice before finally

indicating to the court that the first defendant had not filed any affidavit in reply to the plaintiff's application for injunction as it had filed an application to set aside the writ of summons under O 12 r 10(1), (2), (4), (5) of the Rules of Court 2012 ('the RC 2012') and s 23 of Act 91 on the basis that the High Court had no jurisdiction over the first defendant in respect of the subject matter of the claim. The first defendant contended that it had never submitted to the jurisdiction of the court in Malaysia even though the solicitor that it had appointed had accepted service, entered an appearance on its behalf and attended court. The first defendant claimed that it was 'forced' to come to Malaysia because of the injunction and the acceptance of service of the writ was for the purpose of challenging the jurisdiction of the court. Furthermore, since leave for service of the writ out of jurisdiction under O 11 r 1 of the RC 2012 was never obtained, the court had no jurisdiction to deal with the action.

[28] In rejecting the first defendant's arguments, the Federal Court held that jurisdiction of the High Court was conferred not only under O 11 of the RC 2012, s 23(1) of Act 91 also confers extraterritorial jurisdiction on the High Court. Where jurisdiction is conferred by that section, O 11 r 1 'becomes a mere procedural formality to enable the plaintiff to effect service abroad'. This position was already explained by the Supreme Court in *Malayan Banking Berhad v International Tin Council and another appeal* [1989] 3 MLJ 286 that 'O 11 r 1 assumes jurisdictional importance only in cases falling outside the scope of s 23(1)'; and by the Court of Appeal in *Matchplan (M) Sdn Bhd & Anor v William D Sinrich & Anor* [2004] 2 MLJ 424, and further confirmed by the Federal Court in *Petrodar Operating Co Ltd v Nam Fatt Corp Bhd (in liquidation) & Anor* [2014] 6 MLJ 189.

[29] At para 29, the Federal Court further approved the Court of Appeal's decision in *Matchplan (M) Sdn Bhd & Anor* where Gopal Sri Ram JCA (as he then was) speaking for the Court of Appeal explained that:

> In Malaysia, the High Court is seised with jurisdiction over a dispute in any of the following three cases:
>
> (a) where the defendant is served with the writ or other originating process within the jurisdiction; or
>
> (b) where any of the conditions set out in s 23 of the Courts of Judicature Act 1964 are satisfied; or
>
> (c) where a plaintiff is able to obtain leave of court to serve a defendant who is outside the jurisdiction of the court pursuant to RHC O 11.

[30] In determining whether s 23(1) of Act 91 applies, Ahmad Maarop FCJ, writing for the Federal Court said:

> [31] ... *the allegations by the plaintiff in statement of claim must be assumed to be true*.

Explaining this the Court of Appeal in *Matchplan* said:

> *It is elementary law that for the purpose of determining whether the High Court at Kuala Lumpur has jurisdiction over the defendants, the allegations made by the plaintiffs in their statement of claim must be assumed to be true*. Thus, in *Vanity Fair Mills Inc v T Eaton Co Ltd* [1956] 25 CPR 6 Waterman J observed as follows:
>
> > Although the parties presented many affidavits, depositions, and exhibits for the consideration of the district court, there has been no trial of facts, and the complaint is unanswered. *On an appeal from a judgment granting a motion to dismiss a complaint for lack of federal jurisdiction, we must assume the truth of the facts stated in the complaint.* (Emphasis added.)

See also *Rediffusion (Hong Kong) Ltd v A-G of Hong Kong* [1970] AC 1136 per Lord Diplock.

> So too here. The merits of the plaintiffs' claim that there was publication are yet to be tried. The mere *ipse dixit* of the defendant that there was no publication cannot be determinative of the matter. At the risk of repetition, it needs to be said that *at the point of determining whether the tort of defamation was committed within the jurisdiction, all the allegations in the statement of claim must be presumed to be true*. At that stage there is no preliminary inquiry through a trial on affidavits as to whether the defamatory material was indeed published within the jurisdiction. Were it otherwise, there is a risk that applications to discharge an order granting leave under O 11 r 1 may turn out to be mini trials without determining the suit on its merits.

...

[32] On s 23(1)(c) of the CJA, the Court of Appeal said that under that section there is no burden on the plaintiffs to prove to a conviction that the facts on which their action is based exist within the jurisdiction of the High Court. It is enough if those facts are alleged to have occurred within the court's jurisdiction. This is what the court said:

> That bring you to s 23(1)(c) of the Courts of Judicature Act. That provision has already been referred to earlier in this judgment. Under this section there is no burden on the plaintiffs to prove to a conviction that the facts on which their action is based (that is to say the action defamation) exist within the jurisdiction of the High Court. It is enough if those facts are alleged to have occurred within the court's jurisdiction. That is what the latter part of s 23(1)(c) says. Nothing more; nothing less. Consequently, the plaintiffs are under no duty to adduce positive evidence, as suggested by learned counsel for the defendants, to disprove the defendants' contention that there was no publication. The plaintiffs have alleged that the defamatory statement was published to two persons within the jurisdiction. That is sufficient to bring them within the purview of s 23(1)(c).

[33] Reverting to the present case, the statement of claim discloses that the plaintiff's action is based principally on the following causes of action — trademark infringement and passing off. If either of these causes of actions arose within Malaysia, then under s 23(1)(a) of the CJA Malaysia court shall have jurisdiction to deal with the action. In addition to or alternatively, if the facts on which the

proceedings are based in the case, occurred or are alleged to have occurred within Malaysia, then pursuant to s 23(1)(c) of the CJA, the Malaysia court shall have jurisdiction to try the proceedings. A

[31] The Federal Court then carefully perused the statement of claim, assuming the allegations therein to be true for the purpose of the application, and concluded at paras 44 and 54 that: B

[44] It is clear that except for the first defendant, the other four defendants have their place of business within Malaysia. It is also clear that the facts as aforesaid upon which the proceedings are based exist or are alleged to have occurred within Malaysia. C

...

[54] Based on the aforesaid discussion, we find that, prima facie the facts of the present case come within the ambit of s 23(1)(a) and/or s 23(1)(c) of the CJA. Consequently, the High Court in Malaysia has jurisdiction to try the proceedings in this case. D

[32] Although this decision dealt with s 23 in the context of O 11 r 1 of the RC 2012, the Federal Court's reasoning on the application of s 23 is equally instructive in our present case. The four conditions in s 23(1) are obviously disjunctive in intent and application. Once any of the conditions in 23(1)(a), (b), (c) or (d) are met, the High Court in Malaysia takes jurisdiction. In considering which of the two High Courts has jurisdiction, the same conditions in s 23(1) have to be met but this time examined from the perspective of the 'local jurisdiction' or territorial jurisdiction of the High Court. E F

[33] The plaintiff however, does not have to meet all the conditions in s 23(1) before the particular High Court, be it in Malaya or in Sabah and Sarawak, assumes jurisdiction. Once any one of the conditions is fulfilled and the particular High Court assumes or is seised with local jurisdiction, that jurisdiction is not lost, defeated or divested. The High Court that is first seised with jurisdiction does not become incompetent just because some other condition in s 23(1) conferring jurisdiction on the other High Court is met. What is necessary is the High Court before which the civil proceedings are filed has the requisite jurisdiction to try the proceedings. G H

[34] It is also not for that High Court before which the civil proceedings have been filed to go further and consider whether the other High Court should or ought to try the civil proceedings filed; even if one of the remaining conditions is met in respect of that other High Court. The issue of forum conveniens does not arise where any one of the two High Courts is properly seised with local or territorial jurisdiction. That principle arises only where any I

of the two High Courts, having jurisdiction over the civil proceedings, is considering whether the proceedings are more conveniently tried by the same High Court but sitting in another part of its local jurisdiction or territory.

[35] The issue of forum conveniens cannot arise where both High Courts have local or territorial jurisdiction over the same proceedings because of the peculiar terms of art 121(1) conferring on both High Courts' co-ordinate jurisdiction. Where the principle of forum conveniens is correctly invoked, it frequently resounds in the order of a transfer of proceedings to the other court. With the jurisdiction of both High Courts being co-ordinate and the lack of express power or legislation to transfer proceedings between the two High Courts, the High Court before which the civil proceedings are first filed and where any one of the requirements of s 23(1) is met, remains seised of jurisdiction.

[36] The Federal Court alluded to this absence of power to transfer in *Fung Beng Tiat v Marid Construction Co*:

> As presently advised, there is absent in any Federal legislation that confers powers upon the one High Court to transfer proceedings to the other.

[37] That position in 1996 remains to this day. This absence of power or jurisdiction to transfer proceedings between the two High Courts was recently extensively and comprehensively discussed and determined by the Federal Court in *Hap Seng Plantations (River Estates) Sdn Bhd v Excess Interpoint Sdn Bhd & Anor* [2016] 3 MLJ 553 with the Federal Court concluding that both High Courts cannot transfer proceedings from their respective court to the other High Court.

[38] In that case, the plaintiff had filed civil proceedings before the High Court in Malaya against two defendants. The civil proceedings is based on fraud and forgery of company resolutions and a power of attorney purportedly given to the second defendant by the previous registered owner of a piece of land in Sabah, authorising the second defendant to sell the land and keep the proceeds for himself. The plaintiff sought, inter alia, a declaration to the effect that the plaintiff is the lawful registered owner of the land and that the PA given to the second defendant is null and void. The first defendant is alleged to know about the fraud committed by the second defendant. The first defendant's application to transfer the proceedings to the High Court at Kota Kinabalu was allowed by the High Court at Kuala Lumpur on the basis that the forum conveniens is in Sabah. Amongst the factors that favoured Sabah was the fact that the second defendant is a resident in Sabah; the land in question is in Sabah; the witnesses who purportedly attested the disputed PA and SPA are in Sabah; that the registrar's caveat and private caveat had been entered on the

land office in Sabah. The proceedings were duly transferred. A

[39] When an interlocutory application came up for disposal at the High Court at Kota Kinabalu, David Wong J (as he then was) observed that the transfer order may be unconstitutional. On 14 June 2013, Chew Soo Ho J, invoked s 84 of the Courts of Judicature Act 1964 and referred the following issue to the Federal Court: B

> Whether, in view of art 121(1) of the Federal Constitution, O 57 r 1 of the Rules of Court 2012 and para 12 of the Schedule to the Courts of Judicature Act 1964, the High Court of Malaya has the power or jurisdiction to transfer proceedings to the High Court of Sabah and Sarawak, or vice versa? C

[40] In answering the issue in the negative, the Federal Court said:

> [11] We are of the considered view that the power to transfer any proceeding to any other court as stated in para 12 of the Schedule of the CJA must be read in light of s 3 of the CJA where 'local jurisdiction' is defined to mean in the case of the High Court in Malaya, the territory comprised in the states of Malaya and in the case of the High Court in Sabah and Sarawak, the territory comprising of the states of Sabah and Sarawak respectively (see the case of *Dayasar Corp Sdn Bhd v CP Ng & Co Sdn Bhd* [1990] 1 MLJ 191). It therefore follows that the power to transfer any proceedings must be confined to transfer within a particular local jurisdiction and not between the two local jurisdictions as it were. This would be consistent with the juridical pronouncement in *Sova Sdn Bhd v Kasih Sayang Realty Sdn Bhd* [1988] 2 MLJ 268 wherein Lim Beng Choon J, inter alia, held as follows: D E
>
> > A High Court located at Penang or at Alor Setar is but a branch of the High Court in Malaya and each branch of the High Court in Malaya located in any state has concurrent jurisdiction to entertain any civil proceedings regardless of whether the cause of action arose in another state. F
>
> [12] It is noted that s 25(1) of the CJA has a saving provision to the effect that it states 'Without prejudice to the generality of art 121 of the Constitution ...'. This is similarly reproduced in s 25(2) of the CJA where it states 'Without prejudice to the generality of sub-section (1) the High Court ...'. We agree with the submission of learned counsel for the defendants that the provision in the CJA with respect to the additional powers as set out in the Schedule to the CJA must not have intended to compromise art 121 of the Federal Constitution. It is clear that the wording 'without prejudice' would denote that the additional powers as set out in the said Schedule, namely para 12 should not be inconsistent with art 121's intention for there to be two separate High Courts with their own territorial jurisdiction. G H
>
> ...
>
> [14] We are of the view reading s 3 on the definition of 'local jurisdiction' together with ss 23(1) and 25(1) and (2) of the CJA, it would appear that the Legislature did not have the intention to override or circumvent art 121 of the Federal Constitution I

and the specific territorial jurisdiction granted to each High Court. It was not intended that there could be a transfer of proceedings between the two territorial jurisdictions.

[41] The Federal Court further held that the provision of the power to transfer in O 57 of the new Rules of Court 2012 did not change that reading as the Rules of Court 2012 is not federal law within the meaning of art 160(2) of the Federal Constitution. Similarly, the additional powers of the High Court granted under s 25 of the CJA are powers to be exercised within the local jurisdiction of the High Court, and not otherwise.

[42] Although that decision as well as the other decisions looked at are not exactly on all fours with the facts in the present appeal, the underlying interpretations of the Federal Court on art 121(1) and s 23 of the CJA are nevertheless applicable and binding. In fact, following from that pronouncement of the Federal Court, it would be safe to conclude that on a proper reading of art 121(1) and s 23(1) of Act 91, the fact that one High Court takes jurisdiction under s 23(1) does not mean that it takes such jurisdiction to the exclusion of the other High Court. If a second case be filed before the other High Court, there are enough options available to the parties and to the court to deal with the position, should that really arise, and that is not for this court to consider, let alone speculate.

[43] The factual matrix in the present appeal amply and clearly illustrates this. To start with, it is important to bear in mind that there are no specific provisions in the Companies Act 1965 ('Act 125') prescribing where a winding up petition must or even ought to be filed save that the petition must be to the High Court. Act 125 only provides for the circumstances when a company incorporated in Malaysia may be wound up by the court; that is, the High Court as defined in s 4 of Act 125 and the circumstances as set out in s 218(1)(a)–(n).

[44] In our instant appeal, much scholarship and time had been spent on the single condition of where the defendant, the respondent is resident or has its place of business to the exclusion of the other equally important conditions of s 23(1). While the respondent's place of business is indeed one of the conditions prescribed in s 23(1), it is but one of four conditions. As explained, only one of the four conditions has to be met in order for the civil proceedings to be tried within the local jurisdiction of the relevant High Court. In this case, an examination of the winding up petition abundantly shows that s 23(1)(a) and (c) are in fact met. In her petition, the appellant is seeking to wind-up the respondent pursuant to s 218(1)(b), (f) and (i) of the Companies Act 1965. Section 218(1)(b) reads as follows:

(1) The court may order the winding-up if — A

(a) ...

(b) default is made by the company in lodging the statutory report or in holding the statutory meeting;

B

...

(f) the directors have acted in the affairs of the company in their own interests rather than in the interests of the members as a whole, or in any other manner whatsoever which appears to be unfair or unjust to other members;

C

(g) ...

(i) the court is of the opinion that it is just and equitable that the company be wound up;

D

[45] The appellant is a shareholder of the respondent, a company incorporated under the Companies Act 1965. The appellant's complaints and basis for winding up the respondent under s 218(1)(b), (f) and (i) are dependent on facts. These facts must either exist or have allegedly occurred within the local or territorial jurisdiction of the High Court in Malaya for the High Court in Malaya to take jurisdiction. Amongst her complaints are that: E

(a) the respondent, inter alia, had failed to issue basic obligatory financial statements and annual reports which would have kept the appellant and other shareholders appraised as to the goings on of the respondent;

F

(b) the respondent breached financial reporting and listing requirements;

(c) Bursa Malaysia has taken various actions against the respondent for such breaches including suspending its trading;

(d) the directors of the respondent have been publicly remanded and fined by Bursa; G

(e) the respondent is delisted;

(f) the respondent is involved in 'Boardroom tussle'; and

(g) there were winding up petitions filed against the respondent. H

[46] From the petition, it is apparent that the alleged facts, assumed to be true for the present purposes, exist or have all occurred within the local or territorial jurisdiction of the High Court in Malaya. Those facts are sufficient to sustain a claim that the cause of action arose in the territorial jurisdiction of I the High Court in Malaya — s 23(1)(a) although it is not necessary that every ingredient of the cause of action should have occurred within the same jurisdiction — see *Distillers Co (Bio-Chemicals) Ltd v Thompson (by her next friend Arthur Leslie Thompson)* [1971] 1 All ER 694. Or, it may certainly be

said that the above facts on which the petition is based exist or have occurred within such territory — s 23(1)(c). The merit of the petition is of course, for the parties to deal with and for the winding up court to determine.

[47] The present factual matrix is entirely unlike that presented in the case of *Malaysian Assurance Alliance Bhd v Comsa Properties Sdn Bhd* [2013] 1 CLJ 69. In upholding the preliminary objection of the respondent on jurisdiction raised on two grounds, that the respondent was a Sabah registered company whose charged properties were situated in Sabah, the Court of Appeal examined the factual matrix and said:

> [9] Turning to the factual matrix herein, it is not in dispute that the respondent is a Sabah company with its registered address in Tawau and the landed properties which was charged by the respondent are all situate in Sabah and registered under the Sabah Land Ordinance Cap 68.
>
> [10] The characteristic aforesaid of the respondent falls squarely within the local jurisdiction of the High Court in Sabah thereby excluding jurisdiction of the Kuala Lumpur High Court. The respondent company being a Sabah company Tawau, Sabah would clearly fall within the ambit of s 23(1)(b) of the Courts of Judicature Act 1964 so as to confer jurisdiction to the High Court in Sabah.

[48] In this case, the Court of Appeal further observed that at the time of the appeal, the petitioner had actually filed and appeared as a supporting creditor in another winding up petition presented in the High Court of Sabah in Kota Kinabalu against the respondent by another creditor. That other petition was allowed on 26 April 2010 and the respondent was already wound up at the time of the hearing of the appeal on 26 July 2012. Consequently, the appeal had been overtaken by events and rendered academic.

[49] In considering some of the earlier decisions, care must be taken as the underlying facts and circumstances in each of the cases cited are distinctly and materially different from our present facts. In *Bank Industri & Teknologi Malaysia Bhd v Alom Building Systems Sdn Bhd* [2006] 4 MLJ 405, although the registered office was in Selangor, the business address of the company was in Kuching together with all its assets and machinery were in Kuching; while in *Bank Utama (M) Bhd v Perkapalan Dai Zhun Sdn Bhd* [2003] 5 MLJ 40, the relevant transactions at the heart of the dispute were concluded in Kuching, and the respondent's business address was also in Kuching. In both instances, the High Court in Malaya concluded that it had no jurisdiction to try the civil proceedings in question.

[50] The same may also be said of the decision in *Bank Utama (M) Bhd v Perkapalan Dai Zhun Sdn Bhd* at p 46. Aside from finding that a company's registered address in Kuala Lumpur did not fall within the meaning in s 23(1)(b), Vincent Ng J also held that the High Court of Sabah and Sarawak

at Kuching not only had jurisdiction but was the forum convenience and the most appropriate court to determine the dispute between the parties because the cause of action arose and the place of business of the defendant are all in Kuching. There being no factors within s 23(1) to confer jurisdiction on the High Court in Malaya, the High Court dismissed the appeal, finding that the learned SAR was correct in striking out the claim. In view of the decision in *Hap Seng Plantations (Rivers Estates) Sdn Bhd v Excess Interpoint Sdn Bhd & Anor*, it may not be appropriate to describe the High Court of Sabah and Sarawak as being the forum convenience.

[51] The circumstances in the first instance decision of *Dayasar Corp Sdn Bhd* which was approved in so many subsequent decisions of the Court of Appeal and the Federal Court also bears some scrutiny. The case concerned a petition to wind up the company founded on an unsettled debt. The cause of action was for breach of contract for non-payment of the price of goods sold and delivered. The respondent challenged the jurisdiction of the High Court in Malaya sitting in Johor Bahru on the basis that the respondent's registered office was in Kuching, that the transaction (if any) was done in Kuching and the respondent's witnesses reside in Kuching. There was no circumstance offered to the High Court to suggest that s 23(1) was satisfied in the petitioner's favour. Abu Mansor J agreed and consequently struck out the petition with liberty to the petitioner to file in Kuching. His Lordship did consider whether a transfer was appropriate but decided against it based on the 'special law ... requires close supervision and that can only be done by the Kuching registry'. With respect to His Lordship, this option would not have been open due to the coordinate limits of jurisdiction of the respective High Courts, as discussed earlier.

[52] Again, the circumstances in *Fung Beng Tiat v Marid Construction Co* are equally distinct from the instant appeal. That case involved the presentation of a creditor's petition based on a judgment obtained against the debtor and the interpretation of r 101 of the Bankruptcy Rules 1969 which reads as follows:

> 101(1) The petition shall be filed in the Court in which it is to be presented.
>
> (2) Where the debtor has for the greater part of one year immediately preceding the presentation of the petition carried on business in one State and resided in another State the petition shall be filed in the Court of the State in which he has carried on business.

[53] The petition presented before the High Court in Malaya at Kuala Lumpur was opposed. Relying on r 101 of the Bankruptcy Rules 1969, the debtor contended that the High Court in Malaya did not have the requisite jurisdiction to try the petition since it was an undisputed fact that for the one year preceding the presentation of the petition, the debtor was not resident in

Kuala Lumpur or in any other State within Peninsula Malaysia. He was in fact ordinarily resident in Sandakan, in the State of Sabah during the relevant period. In response, the petitioner argued, inter alia, that by engaging local counsel to resist the petition, the respondent had submitted to the jurisdiction of the High Court in Malaya; that in view of ss 5(1)(d), 93(7) and 131 of the Bankruptcy Act 1967, it was open to the petitioner to present its petition in any state within the Federation and that after the receving and adjudication orders were granted, the petition can be transferred to the state in which the debtor was resident. The non-compliance was in any event, a mere irregularity or defect which did not occasion injustice to the debtor.

[54] The petitioner's arguments were accepted by the High Court judge who held, inter alia, that since the judgment debtor resided and carried on business on Sabah one year before the petition was presented, he was 'therefore residing and carrying on business in the Federation'. The learned judge also treated the non-compliance of rr 101(1) and (2) as irregularities; that by not raising his objections on jurisdiction in the previous attendances in court, the debtor had 'condoned the breach'; and that even if objection had been raised, the court nevertheless had discretion to transfer the case to Sabah.

[55] The Court of Appeal disagreed. In setting aside the decision of the High Court, the Court of Appeal accepted the principle of bifurcation of territorial jurisdiction in art 121(1) as explained in *Syarikat Nip Kit Cheong Timber Contractor*; that the expression 'State' used in the Bankruptcy Act 1967 must be interpreted in the light of the Federal Constitution and the Courts of Judicature Act 1964; that the power to transfer proceedings from one State to another under s 93(7) of the Bankruptcy Act refers to a transfer within the territorial jurisdiction of the respective High Court; and that 'the doctrine of submission to jurisdiction, which is really part and parcel of private international law, applies to jurisdiction that a court has over a particular litigant, and has nothing whatsoever to do with the territorial authority of a court. The expression 'jurisdiction' is one that takes its colour from its context, and, for that reason, great care must be taken in its use to the facts of a particular case'. According to the Court of Appeal:

> The answer to the problem in the present case lies in the observation made by Mohd Azmi FCJ during arguments that once it is recognized that what was in issue was territorial jurisdiction, then, there could arise no question of a submission, jurisdiction in the sense in which it applies in the present case cannot be conferred by consent or waiver. The learned Judge was quite wrong when he thought otherwise.

[56] In that case, the only 'circumstance' relevant and under consideration under s 23(1) of Act 91 was the residence of the debtor; no other circumstance being offered. That is to be contrasted with the present facts where the winding

up presented against the respondent is premised on basis or facts which the court must examine to see if such basis or facts, assumed to be true (*Goodness For Import And Export v Philip Morris Brands Sarl* at p 190), arise in the local or territorial jurisdiction of the High Court in Malaya. Where the answer to that issue is in the affirmative, which is the case here, the High Court in Malaya is seised with the necessary territorial jurisdiction conferred under s 23(1)(a) and (c) of Act 91; even if one of the other circumstance, for example, the residence of the defendant is in the High Court in Sabah and Sarawak. That is a matter of forum conveniens of which, for the present, there is still no legislation or enabling power to effect a transfer from one High Court to the other High Court without violating art 121(1) of the Federal Constitution and s 23(1) of Act 91; and this has been made abundantly clear by the Federal Court in *Hap Seng Plantations (River Estates) Sdn Bhd v Excess Interpoint Sdn Bhd & Anor*, as discussed earlier.

[57] To further illustrate this reading, in a claim for breach of contract over a sale of land situated in Kuala Lumpur filed in the High Court of Malaya in Kuala Lumpur the fact that the intended defendant is resident in Sabah does not deprive the High Court in Malaya from trying the related civil proceedings. Once the High Court is conferred with territorial jurisdiction to try the civil proceedings under any of the circumstances in 23(1)(a), (b), (c) or (d), it remains seised with the necessary territorial jurisdiction even if the High Court in Sabah and Sarawak may also take jurisdiction by reason of some other circumstance under the same s 23(1).

[58] Consequently, the learned judge was erroneous in allowing the respondent's application to strike out the petition on the ground of resident status of the respondent being in Kota Kinabalu. Neither s 218 nor any of the provisions in the Companies Act 1965 or even s 23(1) put the requirement of residence or place of business of the respondent at the top of the list of circumstances. The circumstances in s 23(1) do not possess any order of priority or importance, so long as one of the conditions is fulfilled, the relevant High Court is seised of territorial jurisdiction.

[59] In any case, the learned judge was erroneous in finding that the place of business of the respondent was in Kota Kinabalu at the material time of filing of the petition. When dealing with a corporate entity as is the case here with the respondent, in the context of s 23(1)(b), the registered address of the respondent would represent the place where the respondent resides while its business address is its place of business. The respondent claims that it has no business interests or any connection with West Malaysia. We find that quite hard to fathom given that the respondent is a company incorporated in Malaysia with shareholders such as the appellant, who is resident in West

Malaysia. Surely the shareholders of the respondent form part of the respondent's business interests.

[60] The appellant has relied on her official searches of the Corporate Information of the respondent obtained from Companies Commission of Malaysia ('SSM') which reveal that as at 11 May 2016 before the petition was filed, the respondent's business address is still at Suite 6–7 and Suite 6–8, Wisma UOA Damansara II, No 6 Jalan Changkat Semantan, Damansara Heights, 50490, Kuala Lumpur. Aside from the search, the appellant relied on the respondent's last Annual Return filed in 2010 and this was the only return available to the public including the respondent's shareholders such as the appellant. That annual return which is mandatorily required under s 165 of the Companies Act 1965 records the respondent as still holding out from the same business address. The appellant also alluded to projects that the respondent was involved in one way or another; all of them were located in West Malaysia; and the other winding up petitions filed in West Malaysia.

[61] In reply, the respondent claimed that it was involved in the Taman Sri Serdang project only as main contractor and that project in any case, had long been completed; the other winding up petitions referred to had also been resolved; and that the appellant should not be relying on the annual report of 2010 as it 'well knew that there has not been any accounts filed since 2010. This is the heart of one of the appellant's complaints ... no annual return was filed' since 2010. Lastly, the respondent contended that the appellant was well aware that the respondent no longer had any place of business in West Malaysia by the very fact that she had the petition served by courier on the respondent's present address in Kota Kinabalu. Several tenancy agreements showing the change of address from the KL address were tendered in evidence.

[62] We find that the appellant is entitled to rely on the statutory and official records containing the respondent's business address at the KL address. The tenancy agreements and the reasons why the respondent chose to change are not matters or information that the appellant, one of the respondent's shareholders, or members of the public are required to be aware of or concern themselves. What the appellant needs to be aware of are the information that a company such as the respondent puts out there for the general public, including its shareholders. Such information would include the Bursa announcements and the various statutory returns that are mandated to be filed or lodged under the Companies Act 1965. There were no announcements regarding the change of business address, the announcements were only in respect of the change of registered address.

[63] As for the information sourced from SSM, these are official searches

which the public including the appellant must reasonably be allowed to rely on unless it is shown that the information contained therein is patently false or outdated. Under s 17(e) of the Companies Commission of Malaysia Act 2001 ('Act 614'), SSM has the function of enhancing and promoting 'the supply of corporate information under any laws specified in the First Schedule and to create and develop a facility whereby any corporate information received by, or filed or lodged with, the Commission may be analysed and supplied to the public'. The Companies Act 1965 is amongst the laws set out in the First Schedule. Since the address given by SSM is indeed the same address that the respondent states in its last annual return filed in 2010, the appellant must be allowed to rely on such information for the purpose of determining the respondent's place of business or business address.

[64] The Federal Court's decision in *Summit Company (M) Sdn Bhd v Nikko Products (M) Sdn Bhd* [1985] 1 MLJ 68; [1985] CLJ Rep 304 that a change of the company's registered address takes effect from the time Form 44 is lodged with the Registrar of Companies ('ROC') even though the change is not reflected in the register maintained by the ROC until seven months later, is distinguishable on both the facts and on the law. In that case, there was no evidence of any official search with the ROC prior to the service of the writ under O 62 r 4(1) of the Rules of the High Court 1980 unlike the present facts where reliance is on official searches and statutory documents put out there by the respondent itself ('the annual return'), and not updated. More importantly, we are examining the interpretation and application of quite different laws; the provisions of O 62 r 4(1) which prescribes how service on a registered address is to be done; and s 23(1) which provides for several circumstances which are effectively alternatives to one another in the issue of local jurisdiction of the High Court.

[65] The fact that the petition was served at the Kota Kinabalu address does not change the above conclusion; the service complies with the provisions on how service of an originating process is to be effected. Those service provisions do not confer jurisdiction, certainly not for the purpose of Malaysians resident within both territories of the High Courts in Malaysia. The service at Kota Kinabalu does not, in any way, mean that the High Court in Malaya is divested of jurisdiction conferred under s 23(1)(a), (b) and (c).

[66] Granted all the above reasons, we accordingly allow the appeal with costs of RM10,000 to the appellant subject to the payment of allocator. The order of the High Court is hereby set aside. Deposit is further ordered to be refunded.

Appeal allowed and decision of High Court set aside.

Reported by Ashok Kumar